Supreme Court, U.S.
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No. 98-1-02042

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN, *et al.*,

Petitioners,

– against –

BERNARD KERIK,
Commissioner, New York City Department of
Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether Congress has the power to alter the prospective effect of continuing judicial decrees?

2. Whether the termination of the Consent Decrees under the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626(b), violates the rights to constitutional due process of inmates who had been the beneficiaries of a prospective injunctive consent decree?

3. Whether the termination of the Consent Decrees under the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626(b), violates the rights to equal protection of the laws of a group that is not a suspect class?

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COUNTER-STATEMENT OF THE CASE

The Prison Litigation Reform Act of 1995

On April 26, 1996, Congress enacted the Prison Litigation Reform Act of 1995[1] (the "PLRA") to curtail undue judicial management of local prisons in the absence of any ongoing violation of inmates' federal rights; to prevent the expansion of consent decrees beyond federal violations alleged in the complaint; and to reduce the practical difficulties of modifying prison conditions decrees. Section 3626 accords with this Court's admonitions in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 2183 (1996) -- controlling precedent that petitioners fail even to cite -- that remedial relief in prison conditions cases "must of course be limited to the inadequacy that produced . . . the injury-in-fact" established by a plaintiff or plaintiffs, and that systemwide relief is improper absent systemwide injury-in-fact. Section 3626 has been upheld as constitutional by seven Circuit Courts of Appeals and struck down by none, and this Court has declined to review its constitutionality five times.[2]

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[1] Pub. L. No. 104-134, 110 Stat. 1321, §§ 801-810 (Apr. 26, 1996) (§ 802 codified at 18 U.S.C. § 3626).

[2] *See Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (*en banc*), *petition for cert. filed June 21, 1999*; *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), *cert. denied sub nom. Hadix v. McGinnis*, __ U.S. __, 118 S. Ct. 2368 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (*per curiam*), *cert. denied*, __ U.S. __, 118 S. Ct. 2375 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2366 (1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118

(continued...)

Section 3626 defines the contours of prospective relief that federal courts may order or approve in actions brought to redress unlawful conditions in state or local prisons. Section 3626(a) limits prospective relief in a prison conditions action to that which is both necessary and narrowly tailored to correct current unconstitutional conditions of confinement.[3] Under § 3626(b)(2), defendants may move for immediate termination of all prospective injunctive relief, "whether . . . granted or approved before, on or after" enactment of the PLRA, on the basis that it does not meet the need and narrow tailoring requirements of § 3626(a). The PLRA also includes an express limitation on the termination provision, mandating that prospective relief "shall *not* terminate" if:

> the court makes written findings based on the record that prospective relief remains

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[2] (...continued)
S. Ct. 2374 (1998); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997); *see also Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *superseded by* 1999 U.S. App. LEXIS 13405 (9th Cir. June 18, 1999) (constitutional challenges not reached because held to be moot).

[3] Specifically, 18 U.S.C. § 3626(a)(1) provides in pertinent part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

> necessary to correct a current and ongoing violation of the Federal right,[4] extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(3) (emphasis added).

The Consent Decrees

The consent decrees that have governed respondents in this case for the past twenty years (the "Consent Decrees") are a prime example of the sort of "wildly . . . intrusive" judicial decree that this Court decried in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. at 2185. Although the Consent Decrees were initially formulated to remedy conditions of confinement that were alleged but never proven to exist twenty-four years ago, in *Benjamin v. Malcolm* and other complaints subsequently consolidated with it in 1975. *See* Joint Appendix on Appeal ("JA") 134-92, 309-25; Pet. at 7a. However, they have since "generated a judicially administered structure comprising over ninety related court orders, and extending to more than thirty discrete areas of prison administration" regulated in minute detail.[5] Pet. at 8a. In that regard, the Consent

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[4] At the time of the district court's and panel's decisions, this language was "current *or* ongoing." The language was subsequently clarified to read "current *and* ongoing." Pub. L. No. 105-119, 111 Stat. 2440 (November 27, 1997) at § 123(a)(2) (emphasis added).

[5] For example, the Consent Decrees require that "[n]either coffee, tea nor milk shall be pre-sweetened"; that menus "respond to the ethnic, (continued...)

Decrees closely resemble the order that this Court in *Lewis* termed "the *ne plus ultra* of what our opinions have lamented as a court's 'in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

In many respects, the Consent Decrees go well beyond present constitutional norms; for example, they prohibit double-celling, mandate extensive access to both legal materials and legal coordinators, require the distribution of free newspapers, and mandate free local telephone calls. In certain instances, the prospective relief goes to issues or subject matters that were not even raised in the complaint. Thus petitioners' references to respondents' alleged "noncompliance" within the past ten years relate nearly exclusively to noncompliance with the Consent Decrees, not with constitutional standards. In addition, any changes in these provisions, whether major or minor, must receive federal judicial approval, generally obtained only after voluminous discovery and protracted negotiation with plaintiffs' counsel.[6]

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[5] (...continued)
religious and social needs and tastes of the detainee population"; that certain areas of the jails be cleaned with a solution consisting of 1/4 cup Boraxo to a gallon of water; and that mops be stored in a particular manner.

[6] For example, within the past four and a half years, in the interest of reducing inmate-on-inmate violence, the Department was required to undergo protracted processes involving multiple negotiating sessions with plaintiffs' counsel, motion practice, and extensive discovery, simply to prohibit "gang-identifying" jewelry (JA274) and, later, to (continued...)

Furthermore, contrary not only to the PLRA but also to this Court's jurisprudence, *see Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50 (1991), the Consent Decrees are enforceable in perpetuity. The Disengagement Plan approved in 1987, while providing for the temporary suspension of enforcement of individual provisions of the Consent Decrees, does not establish a "method for ending this litigation", as petitioners assert it does. Pet. at 6. On the contrary, even after the Department has been officially certified as fully complying with every provision of the Consent Decrees, it requires the case to be transferred to and to remain indefinitely on the District Court's inactive docket, from which petitioners will be entitled to revive it at any time on a showing of noncompliance with any term of the Consent Decrees, whether or not such alleged noncompliance would constitute a constitutional violation (JA210-11, 217, 242, 278). Respondents will also remain obliged in perpetuity to perform regular, formal audits establishing their compliance with the more than thirty issues encompassed by the Consent Decrees (JA242, JA278) and to obtain court approval of any changes in Consent Decree provisions (JA213, 242, 278).

Conditions in the Jails as of 1996

Petitioners state that defendants "still had not complied" with the Consent Decrees when the proceedings below commenced in 1996. Pet. at 6. They cite two reports

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[6] (...continued)
modify the delivery of law library services to the 350 inmates housed in the Central Punitive Segregation Unit. *See Benjamin v. Jacobson*, 923 F. Supp. 517 (S.D.N.Y. 1996).

by the court-appointed monitor, the Office of Compliance Consultants ("OCC"), one in early 1996 in which they claim "OCC reported non-compliance in a number of significant areas," and another in mid-1996 citing "continuing noncompliance" involving primarily physical plant issues. In most of these areas, however, OCC's complaints were insignificant.[7] In fact, the two 1996 reports, read together with the Department's responses, demonstrate a high degree of compliance with the Consent Decrees (JA250-57, 279-81).

Under both the PLRA and *Lewis v. Casey*, moreover, the proper standard is compliance not with the Consent Decrees, but with the Constitution. Since 1996, the District Court has found that only a single instance of noncompliance violated constitutional requirements. *See* Opinion of the United States District Court for the Southern District of New York Concerning Jail Fire Safety (Nov. 12, 1998), Pet. at 247a. And, with regard to that one instance, the Court held that respondents' pre-existing plans would adequately remedy fire safety conditions at the few correctional facilities at issue, and imposed no remedy other than the completion of those plans and the institution of a new procedure for responding to internal reports of fire safety deficiencies. Pet. at 255a-258a.

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[7] For example, petitioners' reference to reported noncompliance with food service requirements, Pet. at 6, concerns such matters as the failure of inmate food service workers to wear hair nets, aprons or gloves on isolated occasions (JA350-55).

Proceedings Below

Respondents moved in the District Court on May 24, 1996 for an order vacating the Consent Decrees pursuant to § 3626(b)(2) of the PLRA. In opposition, petitioners challenged the constitutionality of the statute but did not seek an opportunity under § 3626(b)(3) to establish the existence of current or ongoing unconstitutional conditions warranting the continuation of injunctive relief. *Benjamin v. Jacobson*, 935 F. Supp. 332, 336-37, 343 (S.D.N.Y. 1996) (*Benjamin I*), Pet. at 142a, 156a (JA246). On July 23, 1996, the District Court granted respondents' motion and vacated the Consent Decrees in their entirety, rejecting each of petitioners' constitutional arguments. Petitioners moved to alter or amend the order, or in the alternative for a stay of the order pending appeal; only at the end of their reply brief on that motion, in a footnote, did petitioners seek an opportunity to make a showing pursuant to § 3626(b)(3) at some unspecified future time that there then existed at the jails any current or ongoing unconstitutional conditions of confinement. The District Court denied the motion in all respects except as to the application for a stay, which it granted pending an application to the Court of Appeals for a stay pending appeal (JA92-93).

The Court of Appeals granted a stay pending appeal and, on August 26, 1997, affirmed the District Court order in part and reversed in part. *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (*Benjamin II*), Pet. at 101a. The panel rejected all of petitioners' constitutional arguments, but construed § 3626 as providing for judicial termination of only further federal court enforcement of consent decrees; the decrees were not themselves to be terminated, remaining in effect as contracts enforceable in state court.

Pet. at 134a. The panel continued in effect the stay of the District Court order, pending review by this Court.

On December 27, 1997, the Court of Appeals granted respondents' application for rehearing *en banc*. *See* Pet. at 99a. On March 23, 1999, the *en banc* Court affirmed the District Court's decision upholding the constitutionality of § 3626 and held that the statute provided for termination of the Consent Decrees themselves, not just of further federal court enforcement of the decrees. However, the Court of Appeals reversed the District Court's order insofar as it directed the *vacatur* of the Consent Decrees rather than their termination, and it remanded the case to the District Court for further proceedings pursuant to § 3626(b)(3). *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (*en banc*) (*Benjamin III*), Pet. at 1a. The Petition For A Writ Of Certiorari (the "Petition") was filed on June 21, 1999.

REASONS FOR DENYING THE WRIT

I. THERE IS NO COMPELLING REASON UNDER RULE 10 FOR REVIEW OF THE DECISION BELOW

Review on a writ of certiorari is a matter of this Court's discretion, and is granted only "for compelling reasons". Rule 10, Rules of the Supreme Court of the United States ("Rule 10"). Petitioners set forth no compelling reason for review of the decision below, and indeed fail even to mention this Court's standards for granting petitions for certiorari as set out in Rule 10.

One reason that this Court might grant review by certiorari would be the existence of a conflict among the Circuits on "an important matter." Rule 10(a). In this case, there is no conflict at all among the seven Circuits that have decided any of the constitutional issues of separation of powers, due process, and equal protection that are presented in the Petition. *See Benjamin III, supra*; *Imprisoned Citizens Union*, 169 F.3d 178; *Hadix*, 133 F.3d 940; *Dougan*, 129 F.3d 1424; *Inmates of Suffolk County Jail*, 129 F.3d 649; *Gavin*, 122 F.3d 1081; *Plyler*, 100 F.3d 365; *cf. Taylor*, 1999 U.S. App. LEXIS 13405 (constitutional challenges not reached because held to be moot).[8] These decisions are all consistent with one another in their analysis of the constitutional and statutory issues presented.

Moreover, as noted above and discussed in Point II below, the *en banc* decision of the Second Circuit is fully consistent with the prior decisions of this Court. *See* Rule

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[8] Petitioners' Supplemental Brief (July 12, 1999) does not alter this conclusion. Petitioners go to great lengths, even engaging in abstruse analysis of the composition of various courts and panels, to persuade this Court of the existence of a conflict among the Circuits. Their conclusion, however, relies upon reading the tea leaves of dictum and dissent, and ignores the holding of the *en banc* Ninth Circuit Court of Appeals, which expressly declined to reach the issue of the constitutionality of § 3626(b). At best, petitioners have anticipated a future determination that does not accord with the unanimity of the Circuits that have decided these constitutional issues to date. If and when such a determination is made, the parties to that future action may then petition this Court for a writ of certiorari. For now, *Taylor* -- whether or not it reveals a split *within* the Ninth Circuit -- provides no basis for granting certiorari in this case.

10(c).[9] This Court has denied all five petitions for certiorari on these issues in the last two years. Just as those decisions did not warrant review by this Court, neither does the decision of the Second Circuit below. In short, there is no compelling reason for this Court to grant petitioners the writ.

II. THE TERMINATION PROVISION OF THE PLRA, 18 U.S.C. § 3626, HAS CONSISTENTLY BEEN UPHELD AS CONSTITUTIONAL

A. Congress has the power to alter the prospective effect of continuing judicial decrees

Petitioners reiterate their argument that the termination provision of the PLRA violates constitutional separation of powers principles by requiring federal courts to reopen final judgments. This Court has already declined, on five separate occasions, to review precisely this issue, *see cases cited supra* at 1 n.2, and petitioners present no new argument that would warrant this Court's review of the decision below. Instead, misreading *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995), citing vacated and overruled decisions, petitioners rely on nearly universally rejected legal arguments and on rhetorical speculation about the putative calamitous consequences of allowing the termination provision of the PLRA, 18 U.S.C. § 3626, to stand.

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[9] Rule 10(c) identifies as a reason that this Court might grant a petition for certiorari that a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In *Plaut*, this Court struck down a statute that purported to reopen final determinations of monetary damages and, reaffirming the validity of long-standing precedent, expressly excepted from its holding cases that, like this one, involve prospective injunctive relief.[10] *Plaut*, 514 U.S. at 232 (citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (*Wheeling Bridge II*)); *see also Benjamin III*, 172 F.3d at 160-61 (interpreting *Plaut*). The *Plaut* Court thus reendorsed the *Wheeling Bridge II* principle that "legislation does not violate the separation of powers by 'alter[ing] the prospective effect of injunctions.'" *Benjamin III*, 172 F.3d at 161 (quoting *Plaut*, 514 U.S. at 232).

As the court below summarized the applicable law:

> Under the separation of powers [principles of *Plaut* and *Wheeling Bridge II*], Congress lacks the authority to alter a finally rendered judgment ordering the payment of money. On the other hand, to the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination of its future effect if the law on which the injunction was predicated has been changed.

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[10] *Plaut* was a damage action under the Securities Act that invalidated legislation specifically intended to reopen cases previously dismissed under the statute of limitations. 514 U.S. 211.

Id.[11]

Under *Plaut* and *Wheeling Bridge II*, the application of the PLRA to an existing consent decree is consistent with separation of powers principles, as each Circuit that has addressed the issue has determined. *See cases cited supra* at 1 n.2. A judgment with continuing, prospective effects, although a "final judgment" in some senses, remains subject to change in response to new legislation. Indeed, this Court recently held that just such a judgment -- a court-ordered stipulation regarding attorneys' fees in an analogous prison conditions class action -- must be altered by operation of § 803(d)(3) of the PLRA, 42 U.S.C. § 1997e(d)(3), enacted after the entry of the judgment, which limits the hourly rate at which attorneys' fees may be awarded in prison conditions cases. *See Martin v. Hadix*, 67 U.S.L.W. 4500 (June 21, 1999).

The PLRA is an example of the sort of prospective legislation applicable to injunctive decrees that this Court has upheld at least since the time of *Wheeling Bridge II*. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) (change in statutory law warrants modification of decrees with ongoing effects); *see also Benjamin III*, 172 F.3d at 161 (citing, *inter alia*, *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961); *United States v. Swift*

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[11] Petitioners' suggestion that there is no principled distinction between unpaid monetary damages and injunctive relief, Pet. at 17 n.17, is disingenuous. In the former circumstance, the right at issue, together with the remedy, have both been finally determined and adjudicated; all that remains for the future is the execution of the already-determined remedy. In the latter case, however, the contours of the remedy itself are not finally determined.

& Co., 286 U.S. 106, 114-15 (1932); *Wheeling Bridge II*, 59 U.S. (18 How.) at 431-32). Such legislation is applicable also when the injunctive relief is entered on consent. *See Swift*, 286 U.S. at 114; *Agostini v. Felton*, 521 U.S. 203, __, 117 S. Ct. 1997, 2006 (1997) ("A court errs when it refuses to modify an injunction or consent decree in light of [statutory or decisional law] changes.") (quoted in *Benjamin III*, 172 F.3d at 162). Contrary to petitioners' assertion, Pet. at 14-15 n.14, *Swift* and *Agostini* are not irrelevant; rather, they reaffirm the distinction, consistently upheld by this Court, between

> restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . .

Rufo, 502 U.S. at 379-80, *quoting Swift*, 286 U.S. at 114; *see also Western Union Telegraph Co. v. International Brotherhood of Elec. Workers*, 133 F.2d 955, 957 (7th Cir. 1943) ("though a decree may be final as it relates to an appeal and all matters included or embodies [sic] in such a step, yet, where the proceedings are of a continuing nature, it is not final").

Plaut protects the finality not of all judgments but only of judgments at law that represent "the last word of the judicial department with regard to a particular case or controversy." *Plaut*, 514 U.S. at 227. It is evident from the number of modifications made over the last two decades to the Consent Decrees in this case that such an executory decree with prospective effect is hardly the court's "last

word", even after the decree has become final for purposes of appeal. In *Plaut*, the Supreme Court reaffirmed that legislation that alters the law applicable to an executory consent decree warrants revisiting that decree if the legislation is enacted while the consent decree is still subject to enforcement. *Id.*, 514 U.S. at 232.

Petitioners cannot cite any authority to dispute the constitutional validity of the PLRA, and their challenge therefore relies on a combination of vacated and overruled decisions, fallacious reasoning, and their own speculation about the ramifications of upholding the statute. *See, e.g.*, Pet. at 12-13 (citing *Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *superseded by* 1999 U.S. App. LEXIS 13405 (9th Cir. June 18, 1999); *Denike v. Fauver*, 3 F. Supp.2d 540 (D.N.J. 1998), *overruled by Imprisoned Citizens Union v. Shapp*, 169 F.3d 178 (3d Cir.)).

For example, contrary to petitioners' assertions, the PLRA does not *require* a court to set aside anything, in contrast to the Securities Act amendments struck down in *Plaut*, which required dismissals to be reopened. *Cf.* Pet. at 9, 15.[12] Rather, Section 3626(b)(3) provides that prospective relief *shall not* terminate if the court "makes

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[12] Petitioners' claim that the PLRA requires judicial revision of injunctions, like the colonial legislatures that mandated new trials in completed litigation, Pet. at 9, 15, not only misstates the effect of the PLRA but also appears to be an attempt to revive an argument that petitioners abandoned before the *en banc* hearing in *Benjamin III*, namely, the assertion that the PLRA prescribes a rule of decision in particular cases in violation of the rule of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See Benjamin III*, 172 F.3d at 159. This assertion should be disregarded.

written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right" and if the court makes the other findings set forth in the statute. 18 U.S.C. § 3626. Indeed, the termination provision of the PLRA is not even triggered unless a defendant affirmatively moves to terminate a decree, which would be counterproductive unless the defendant believed in good faith that conditions in its correctional facility were constitutional.

Nor does the PLRA create its own *raison d'être* merely by altering the law concerning the "reopening of judgments", as petitioners suggest. Pet. at 14. The PLRA is not "a law overturning injunctions", *id.*; rather, by its passage Congress changed the law of remedies by imposing the requirement of a finding of a constitutional violation in order to warrant prospective injunctive relief in prison litigation. Thus, defendants in prison litigation are no longer limited to the relief afforded by Federal Rule of Civil Procedure 60(b)(5) to seek modification of injunctive decrees. When Congress established new standards for the termination of injunctive relief in prison litigation under § 3626, it facilitated the appropriate revision or termination of relief in conformity with *Board of Education v. Dowell*, 498 U.S. at 247-50, and *Freeman v. Pitts*, 503 U.S. at 491. Petitioners' reliance on Rule 60(b)(5) and on *Dowell* and *Freeman*, *see* Pet. at 11-12, is therefore inapposite.

Finally, whether or not "scores of bills" were introduced before the passage of the PLRA to nullify "politically unpopular federal judicial action" in various areas, Pet. at 18, the fact remains that no such bill was enacted prior to the PLRA, and none has been enacted since the PLRA was passed over three years ago, despite

petitioners' vague unfounded assertion that "one can expect further efforts to curtail the judiciary's actions on behalf of other unpopular constituencies and causes." *Id.* Indeed, one of the two academic sources that petitioners cite to support their assertion of imminent, legislatively induced chaos in fact affirms Congress's authority to adjust available remedies, as long as it does not thereby prevent vindication of a constitutional right. *See* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 527, 531 (1974); 18 U.S.C. § 3626(b)(3).[13] As the PLRA expressly retains remedies for constitutional violations, it meets this standard.

In summary, as the court below noted,

> In the PLRA, Congress has neither defined nor altered the federal rights that may be vindicated in prisoner litigation. Nor has it forbidden the court, if it finds a violation of federal right, to order or enforce such relief as the court finds is needed to remedy the violation of that right. The Act's termination provision simply forbids the continuation of prospective relief that exceeds what is needed to remedy a continuing violation of the federal right. . . .

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[13] "Congress . . . may enact any jurisdictional statute that does not prevent vindication of a constitutional right "and, "[a]s long as the federal rights involved in a case can be adequately vindicated in some manner, Congress may adjust the available remedies with impunity." Eisenberg, *supra*.

> The Act's elimination of the parties' ability to obtain judicial enforcement of the forward-looking provisions of a judgment obtained without such adjudication [of the merits of plaintiffs' claims or of the appropriate scope of the remedy] neither affects the court's power "'to say what the law is' in particular cases and controversies," *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177), nor infringes "litigants' right to have claims decided before judges who are free from potential domination by other branches of government," *Commodity Futures Trading Commission v. Schor*, 478 U.S. at 848.

Benjamin III, 172 F.3d at 163-64. The PLRA does not violate Article III principles of separation of powers.

B. Section 3626(b) Is Consistent With Petitioners' Due Process And Equal Protection Rights

"Plaintiffs' remaining constitutional contentions [regarding claimed due process and equal protection violations] do not require extended discussion." *Benjamin III*, 172 F.3d at 164.

1. Due Process

It is established that, although a consent decree borrows elements from both judgment and contract, "the provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in

law or circumstances." *Benjamin III*, 172 F.3d at 164. As this Court noted in *System Federation*, principles of contract do not constrain a court's consideration of the modification of a consent decree:

> We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . [I]n truth what was then adjudged was *not* a contract as to any one. The consent is to be read as directed toward events *as they then were*. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

364 U.S. at 651, *quoted in Benjamin III*, 172 F.3d at 164 (emphasis added). As consent decrees do not create vested rights, the PLRA does not deprive plaintiffs of any property rights. This principle has been acknowledged by each Circuit that has considered the issue. *See cases cited at* 1 n.2.

Plaintiffs rely on inapposite precedent. *Tonya K. v. Board of Educ.*, 847 F.2d 1243 (7th Cir. 1988), for example, *cited in* Pet. at 21-22, is limited by its facts to money judgments -- in that case, relating to attorneys' fees -- and does not apply to injunctive judgments with prospective application. Such injunctive judgments, like the Consent Decrees, do not have the finality required to establish vested rights any more than they are final for separation of powers purposes. *See Benjamin I*, 935 F. Supp. at 356 ("The principle that parties have vested rights in a court judgment is essentially the due process analog of

the separation-of-powers doctrine discussed in *Plaut*") (citing, *inter alia*, *Tonya K.*, 847 F.2d at 1247).

Petitioners also miscite *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998) (*per curiam*), *cited in* Pet. at 23, in which this Court held that courts may not deprive litigants of an apparently available statutory remedy, in that case a post-payment tax refund. The PLRA does not deprive plaintiffs of a remedy; rather, it requires them to show a violation of a federal right that warrants a remedy. This hardly constitutes deprivation of property without due process. And *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *cited in* Pet. at 22-23, is a procedural due process case that has nothing to do with vested rights but instead concerns state-created procedural entitlements. Unlike the implementation of the state claims handling procedure struck down in *Logan*, the PLRA is not arbitrary; it affects only prospective relief and not finally determined rights; and, as previously noted, it mandates a procedure for retaining remedies for constitutional violations.

2. Equal Protection

As petitioners concede, they are not members of a protected class. As they also apparently concede, the statute does not burden a fundamental right,[14] and strict scrutiny therefore is not the appropriate level of review. Pet. at 26. Nor do petitioners appear to argue that § 3626(b) fails the traditional rational basis test. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (legislative classification "must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). Rather, petitioners seek to invoke a "heightened" level of rational basis review, based on Congress' claimed "*attempt*[] to burden a disfavored -- though not suspect -- class's ability to employ the remedial mechanisms of society to protect itself and its constitutional rights." Pet. at 26 (emphasis added). Petitioners rely on *Romer v. Evans*, 517 U.S. 620 (1996), as support for the application of this "heightened" level of scrutiny; on the contrary, *Romer* applied traditional minimal scrutiny. *Id.* at 631-32. This purported analogy to *Romer* was expressly rejected by the Panel and District Court below, *Benjamin II*, 124 F.3d at 175, Pet. at 127a; *Benjamin I*, 935 F. Supp. at 353-54, Pet. at 174a-176a, as well as by other Courts of Appeal. *See Inmates of Suffolk County Jail*, 129 F.3d at 660-61; *Gavin*, 122 F.3d at 1090.

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[14] Petitioners do argue that "prisoners in this society" are unable to vote. Pet. at 26. They do not claim that they themselves are unable to vote, and there is nothing in the record below as to the right to vote of either petitioners -- who are pretrial detainees, not convicted prisoners -- or the class of "prisoners in this society", which includes convicted felons whose right to vote may be affected as a consequence of their convictions. The statement therefore should be disregarded.

Petitioners do not argue that the statute actually burdens their ability to obtain a remedy for any claimed violations of their constitutional rights. As the courts below and in the other Circuits have all concluded, § 3626(b) imposes no burden at all on prisoners' ability to obtain and enforce an appropriate remedy for the violation of their constitutional rights: "Nothing in the Act alters plaintiffs' federal rights or prevents the court from granting such relief as is necessary to remedy violations of those rights." *Benjamin III* at 164-65; *see also cases cited at* 1 n.2.[15] Rather, petitioners argue only that Congress should have legislated more broadly and had no rational basis for singling out prisoners' conditions litigation. Pet. at 26-27.

However, as the Court below concluded, "[t]he terms and legislative history of the Act make it clear that, *in the unique context of litigation challenging prison conditions,* . . . Congress adopted the remedial and termination provisions in order to promote, *inter alia*, principles of federalism and judicial restraint." *Benjamin III* (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987)) (emphasis added). The Court found "unquestionably . . . legitimate" Congress's objective of "limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right." *Benjamin III*, 172 F.3d at 165; *accord, Imprisoned Citizens Union*, 169 F.3d at 189; *Inmates of*

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[15] The Equal Protection challenge was not before the Court of Appeals for the Sixth Circuit; however, that Court noted the decisions of the First, Second, Eighth, and Eleventh Circuits and stated that, were that challenge to the PLRA before it, "we would similarly reject it." *Hadix*, 133 F.3d at 943 n.3.

Suffolk County Jail, 129 F.3d at 660; *Dougan*, 129 F.3d at 1427; *Gavin*, 122 F.3d at 1090; *Plyler*, 100 F.3d at 374.

Petitioners have submitted no authority to the contrary, and have suggested no reason to overturn the decision below on this ground.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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